UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORTH RIVER INSURANCE COMPANY,	***)***	
Plaintiff	***)***	
v.	***)***	***Docket No. 01-97-P-H***
DENZIL SNYDER, et al.,	***)***	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]

The defendants, Denzil and Candice Snyder, move for summary judgment in this action seeking subrogation for insurance benefits paid as a result of a fire. I recommend that the court grant the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a

[1] The plaintiff has requested oral argument on the motion. Plaintiff's Motion for Oral Argument, etc. (Docket No. 15). Inasmuch as the parties' papers provide a sufficient basis on which to decide the motion, the request is denied. The plaintiff also requests in this motion leave to file a surreply. That motion is granted.

reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the parties' statements of material facts submitted pursuant to this court's Local Rule 56.

The Cortland Court apartment complex is owned and managed by Cortland Associates. Defendant's Supporting Statement of Material Facts ("Defendant's SMF") (Docket No. 8) ¶ 1; Plaintiff's Opposing Statement of Material Facts and Additional Facts, etc. ("Plaintiff's Responsive SMF") (Docket No. 11) ¶ 1. The plaintiff, North River Insurance Company, insured Cortland Associates from the risk of fire. *Id.* ¶ 2. Cortland Associates is a named insured under the insurance policy at issue. *Id.* ¶ 3. The defendants and their two children were tenants in Unit 9 of the Cortland Court apartment complex beginning March 1, 1998. *Id.* ¶ 4.

The defendants' tenancy was subject to a standard lease agreement with Cortland Associates and an employment agreement providing for reduced rent. *Id*. ¶ 5. The reduced rent was part of defendant Candice Snyder's compensation package. *Id*. Candice Snyder was employed by Cortland Associates as a leasing agent; her job responsibilities included meeting with new tenants to review and explain the standard lease agreement. *Id*. ¶¶ 6-7.

Upon moving into Cortland Court the defendants took out a renters' insurance policy with Concord Insurance. Additional Material Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF at pages 3-7) ¶ 27; Reply to Plaintiff's Statement of Additional Facts ("Defendants' Responsive SMF"), included in Defendants' Objections to Plaintiff's Opposition to Statement of Material Facts, etc. (Docket No. 14) at pages 4-11, ¶ 27. The policy covered the defendants' personal property and also provided $300,000 in liability protection. *Id*. ¶ 28.

Prior to the fire, Valerie Swetavage was engaged to Candice Snyder's brother and lived with him in Unit 12B of the Cortland Court apartment complex. Defendants' SMF ¶ 8; Plaintiff's Responsive SMF ¶ 8. Their son lived with them. *Id*. Their tenancy was subject to an identical lease agreement. *Id*. ¶ 9. Beginning in 1997, Swetavage volunteered to watch over one of the defendants' sons during the work day after the defendants' former babysitter moved away. *Id*. ¶ 17. On April 30, 1999 Swetavage was babysitting her son and the defendants' children at the defendants' apartment. *Id.* ¶ 15. She watched over the defendant's son because she was already staying home with her own son and had the choice of doing so at her apartment or at the defendants' apartment. *Id*. ¶¶ 18-19. The defendants sometimes gave Swetavage money or groceries. *Id*. ¶ 21. The parties dispute whether this was in payment for the babysitting. The defendants were not home when the fire started. *Id*. ¶ 15.

Defendant Denzil Snyder knew that Swetavage smoked on the deck outside his apartment. Plaintiff's SMF ¶ 30; Defendants' Responsive SMF ¶ 30. He never told Swetavage that there were

any precautions she needed to take when smoking at his apartment. *Id*. If either of the defendants had told Swetavage that she was not allowed to smoke on the deck, she would have stopped smoking there. *Id*. ¶ 39. Swetavage was smoking on the deck shortly before the fire. *Id*. ¶ 37. Chief Henderson of the South Portland Fire Department determined that the fire was caused by the careless discarding of a cigarette on the deck by Swetavage. *Id*. ¶¶ 31-32. The defendants contend that this is not the correct conclusion about the cause of the fire.

Neither party includes in their respective statements of material facts the basic facts giving rise to this action — that a fire occurred at the defendants' apartment on April 30, 1999, and that the plaintiff paid a claim as a result. These facts are set forth in the complaint, Complaint (Docket No. 1) ¶¶ 10, 12-13, and do not appear to be in dispute. Accordingly, this recommended decision assumes those allegations to be true.

III. Discussion

The defendants contend that this subrogation action is barred because they are implied co-insureds under the policy at issue; the lease allocates the risk of fire damage to Cortland Associates; the plaintiff cannot show that they were negligent; the plaintiff cannot show that they are vicariously liable for any negligence of Swetavage; and the plaintiff cannot show that they breached the lease agreement. Defendant Snyder's [sic] Motion for Summary Judgment, etc. ("Motion") (Docket No. 5) at 1-2. I find the first argument to be dispositive, but only because I conclude that it is likely that the Maine Law Court would adopt the *Sutton* doctrine, as that legal principle is discussed below. There are no clear controlling precedents on this point in the decisions of the Law Court, and for that reason I believe that certification to the Law Court pursuant to Rule 67B of the Maine Rules of Civil Procedure would be appropriate in this case.

The *Sutton* doctrine, so called after *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), holds that, as a matter of law, a tenant cannot be liable in subrogation to the insurer of a landlord for damages paid as a result of fire absent an express agreement to the contrary in a written lease. The courts that have addressed this issue are split. *See, e.g., Commercial Union Ins. Co. v. North Am. Paper Co.*., 138 F.Supp. 222, 223 (D. Mass. 2000) (Massachusetts has adopted doctrine); *56 Assocs. v. Frieband*, 89 F.Supp.2d 189, 194 (D. R.I. 2000) (predicting that Rhode Island would reject doctrine); *Lexington Ins. Co. v. Raboin*, 712 A.2d 1011, 1012 (Del. Super. 1998) (adopting doctrine); *Bannock Bldg. Co. v. Sahlberg*, 887 P.2d 1052, 1055 (Idaho 1994) (rejecting doctrine). However, *Sutton* apparently represented the majority position in 1996, when it was adopted by the Maine Superior Court. *Brooks v. Lehrman*, Maine Superior Court (Penoscot County) (Kravchuk, J.), Docket No. CV-93-280, Order on Motion for Summary Judgment (May 28, 1996) at [2]-[4]. The Law Court mentioned the subject in *Willis Realty Assocs. v. Cimino Constr. Co.*, 623 A.2d 1287, 1289 (Me. 1993), but took no position on it.

The parties differ on the question whether there is an express agreement within the meaning of *Sutton* in the lease at issue here. The defendants contend that "there is no dispute that the lease does not contain any provisions that explicitly required the Snyders or Valeri[e] Swetavage to obtain fire insurance or explicitly allocate the burden of risk for loss from fire on the tenants." Motion at 7. The plaintiff responds that the lease "expressly and unequivocally provides that the Snyders would be responsible for any damages to the premises caused by their negligence or that of their guests or invitees," referring to paragraphs 10 and 16 of the lease.[2] Plaintiff's Memorandum of Law in

[2] Paragraph 10 provides, in relevant part:

> REPAIR AND MAINTENANCE: All maintenance requests must be called into the rental office . . . . Both the Landlord and the Resident have responsibility for the repair and maintenance of the Apartment. . . . In general, the Resident will always be responsible for any defects resulting from

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Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 10) at 3. Under Maine law, an indemnification claim based on contract "must rest on a clear, express, specific, and explicit contractual provision, under which the party against which a claim is to be asserted has agreed to assume the duty to indemnify." *Devine v. Roche Biomedical Labs., Inc.*, 637 A.2d 441, 446 (Me. 1994). The defendants rely on *Devine*, Defendant Snyders' Reply to Plaintiff's Opposition, etc. ("Defendants' Reply") (Docket No. 13) at 1-2, and the principle that "[a] party cannot be subject to a contractual indemnification obligation that it has not unambiguously assumed," *Devine*, 637 A.2d at 446, but the plaintiff is asserting subrogation, a legal theory of recovery, not indemnification pursuant to the defendants' lease.

While the Law Court has also stated that "[t]he implication of a contract term is only justified when the implied term is not inconsistent with some express term of the contract and when there arise from the language of the contract itself, and circumstances in which it was entered into, an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties," *Top of the*

> abnormal conduct by the Resident, which includes any damages or deterioration as a result of the negligence, carelessness, accident or abuse of the premises by the Resident or members of his/her household, invitees or guests. Whenever the Resident uses the Apartment . . . the Resident must exercise reasonable care to avoid damage to floors, walls, doors, windows, ceiling, roof, staircases, porches, chimneys, or other structural parts of the Building. . . . If the Landlord ever notices that the Resident is not properly maintaining the Apartment or is otherwise failing to comply with the Resident's obligations under this Lease, the Landlord has the right to correct the problem and charge the Resident for any reasonable costs which the Landlord incurs in doing so. The Resident must then promptly reimburse the Landlord for these costs.

Cortland Court/Gallagher Farms Apartment Lease [for Candice L. Snyder and Denzil H. Snyder] ("Lease"), Exh. B to Defendant's SMF, ¶ 10.

Paragraph 16 provides:

> TENANT'S RESPONSIBILITY: The Resident is responsible for the conduct of any and all family members, friends, relatives, delivery personnel, guests and other persons who are invited or allowed by the Resident to be on the Landlord's property. The Resident must make sure that these persons conduct themselves properly and do not violate any provisions of this Lease. Whenever the Landlord has to pay any expense, or suffers any other loss, because of anything done by the Resident or any other person mentioned in this paragraph, the Resident must promptly provide full reimbursement to

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Track Assocs. v. Lewiston Raceways, Inc., 654 A.2d 1293, 1295 (Me. 1995) (citation omitted), that holding is not inconsistent with the application of the *Sutton* doctrine in this case. Strictly speaking, the implication of a term under *Sutton* occurs in the contract of insurance between the plaintiff and the owner of the rental property, not in the lease between the owner and the defendants. Under *Sutton* it is the absence of an express agreement between the landlord and the tenant to the effect that the tenant will *not* be considered a co-insured of the landlord under any policy obtained by the landlord to cover the property at issue that is determinative. *Sutton*, 532 P.2d at 482. No such disclaimer appears in the lease between the defendants and Cortland Associates. The plaintiff contends that paragraphs 10 and 16 of the lease, making the tenant liable for certain costs incurred by the landlord and not excluding fire damage, meet this requirement. Plaintiff's Opposition at 4. However, those paragraphs do not mention insurance and cannot be construed as express agreements concerning insurance or liability for fire damage in particular.

Even when the determining factor identified by the courts addressing this question has been whether the lease, taken as a whole, implies that the landlord will carry fire insurance for the protection of the building and property not owned by the tenant, *see, e.g.*, *Raboin*, 712 A.2d at 1014, it is responsibility for insurance in general or liability for the specific type of damage at issue that is the subject of the *Sutton* doctrine's express-agreement requirement and not merely liability for damages in general, *id*. at 1016; *Commercial Union*, 138 F.Supp.2d at 230; *Frieband*, 89 F.Supp.2d at 194 (lease did not address question of fire insurance or fire damage); *Bannock*, 887 P.2d at 1055; *Home Ins. Co. of Illinois v. National Tea Co.*, 588 So.2d 361, 363-64 (La. 1991) (clear lease term releasing tenant from liability for damages resulting from fire). The *Sutton* doctrine has been applied in cases

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the Landlord.

Id. ¶ 16.

involving liability clauses virtually identical to those upon which the plaintiff relies in this case. *E.g.*, *Peterson v. Silva*, 704 N.E.2d 1163, 1164-65 & n.5 (Mass. 1999).

Subrogation is an equitable remedy, "a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it." *United Carolina Bank v. Beesley*, 663 A.2d 574, 576 (Me. 1995) (citation omitted). As the *Sutton* court noted, subrogation "is a fluid concept depending upon the particular facts and circumstances of a given case for its applicability." 532 P.2d at 482.

> Certainly it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy.
>
> * * *
>
> Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary. The company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it. . . . For to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant — a party occupying a substantially different position from that of a fire-causing third party not in privity with the insured landlord.

Id. In addition, as Judge Kravchuk noted in *Lehrman*, if a tenant in a multi-unit rental property is responsible as a matter of law for all damages arising from its negligence in causing a fire, each tenant must thus obtain its own fire insurance, resulting in the insuring of the same property many times over, a windfall to the insurance companies. The tenant does in fact contribute indirectly to payment of insurance premiums on the landlord's property by paying rent.

On balance, I find the *Sutton* line of cases persuasive and conclude that the Law Court would most likely follow the majority view under the circumstances of this case. Accordingly, I conclude

that the defendants are entitled to summary judgment and that it is not necessary to consider the parties' other arguments.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of October, 2001.

David M. Cohen
United States Magistrate Judge

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